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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1928.

No. 455

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

EDWARD H. JOHNSON,
Respondent.

No. 456

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

MYRTLE J. JOHNSON,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT FOR THE PETITIONER, NEW YORK CENTRAL RAILROAD COMPANY.

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The opinion of the Circuit Court of Appeals in these cases is reported in 27 Federal Reporter, 2d Series, page 699, and is also found at page 467 of the Transcript of Record.

Grounds on which Jurisdiction of this Court is invoked.

(*a*) Section 240 of the Judicial Code as amended February 13, 1925, (28 U. S. C. A. 347; 43 Stat. 938) sustains the jurisdiction of this Court to review these cases by certiorari.

(*b*) The opinion and orders of the Circuit Court of Appeals affirming the judgments of the District Court were filed and entered July 2, 1928 (R. 467, 472, 473). A petition for writs of certiorari was filed in this court on September 20, 1928, and on October 15, 1928, writs of certiorari were granted (R. 473, 474).

(*c*) These cases were actions for damages alleged to have been sustained by Myrtle J. Johnson and Edward H. Johnson, her husband, because of personal injuries suffered by the respondent, Myrtle J. Johnson, while a passenger on one of petitioner's trains (R. 5, 8). They were tried together in the District Court of the United States for the Western District of Missouri, Western Division. Both of respondents' counsel in their argument to the jury stated that "the defense was syphilis" and argued that the petitioner "was trying to put the stigma of indecency upon" the respondent, Myrtle Johnson. (R. 412, 413, 415, 426). Objections to this line of argument were made and overruled to which exception was taken (R. 412, 413, 426). The ruling of the trial Court in this respect was assigned as error in the Circuit Court of Appeals (R. 44, 45, 71, 72). The Circuit Court of Appeals held that there was no justification for the assumption that the defense was syphilis or that the petitioner made these charges against Myrtle Johnson, nor for the "verbal pyrotechnics that counsel were permitted to indulge in" over petitioner's objection and that "this line of argument was likely to create prejudice," but nevertheless affirmed the judgments of the lower court (R. 472).

(*d*) *Waldron* v. *Waldron*, 156 U. S. 361 and *Northern Ry. Co.* v. *Page*, 274 U. S. 65, are believed to sustain the jurisdiction of the Court.

Statement of the Case.

For convenience, the respondents and petitioner will be called respectively plaintiffs and defendant.

The petitions in each case charged that while Myrtle J. Johnson was a passenger for hire, the defendant negligently caused and permitted the car in which she was riding to "suddenly, violently and unusually surge, lurch, jerk, jolt, sway, tilt and rock" as a result of which negligence she was caused to fall and thereby injured (R. 6-8).

The evidence tended to show that between 11:00 and 12:00 o'clock in the evening, after all but the night lights had been extinguished (R. 105), Myrtle J. Johnson and her sister-in-law, Imogene Johnson, who were passengers on one of defendant's fast trains enroute from Harmon, New York, to Chicago, left the club car of the train and went to their berth to retire for the night (R. 105). While Imogene Johnson was seated on the side of the berth, reaching for her night clothes, which were in a suitcase at the foot of the berth (R. 238), and while Myrtle Johnson was standing in the aisle near the foot of the berth, holding in her right hand several folds of the curtain (R. 106, 237), there came what the former described as "the most terrible jerk, almost as though the train were going to stop, but didn't, and jerked and swayed and went on" (R. 107), and what the latter described as "an awful jerk and jolt and a terrible lurch" (R. 238). These movements, Myrtle Johnson testified, threw her body around and her head against the edge of the upper berth (R. 240). Imogene Johnson assisted her to bed, where both ladies slept until nearly noon the next day (R. 151). Imogene Johnson, upon awakening, found that her sister-in-law was ill (R. 113). While a total of twenty-one witnesses testified for the respondents in regard to the physical condition of Myrtle Johnson, there were no witnesses to the actual occurrence except these two ladies. Six members of the train crew, however, testified that there was no unusual jerk or jar. (R. 384, 377-378, 367, 370, 380, 396.) The train was running at its usual rate of speed (R. 378).

In their address to the jury both counsel for the plaintiffs stated that the defense was that Myrtle Johnson had the syphilis and such statements as these were made:

> "The vilest defense made in this case, a defense which would bar that girl from all society, intimated in this case that she had the syphilis. That is the defense in this case, that she had the syphilis. Gentlemen of the jury, they would charge her with a disease which would brand her as bad as a leper and exclude her from the society of decent people. That is the kind of a defense that is in this case, and I resent it. I resent the New York Central coming into this town and saying that that girl has the syphilis and trying to make this jury believe that she has the syphilis." (R. 412, 413.)
>
> "Never again will you ever dare to put that letter of syphilis upon the brow of a decent woman." (R. 426.)

and, as the Circuit Court of Appeals states, counsel proceeded to dilate on and exploit this text *with no justification for the assumption* or for the verbal pyrotechnics that they were permitted to indulge in over the objections of defendant's attorney.

Objections were made to the above mentioned argument to the jury and to the introduction of evidence (R. 96, 110, 288, 357, 21, 409) and the giving of instructions to the jury applying the doctrine of *res ipsa loquitur* to these cases. (R. 444-452.) The jury brought in verdicts for the plaintiffs for the full amount sued for in each case—$25,000 in Myrtle Johnson's case and $10,000 in her husband's case—upon which verdicts judgments were entered (R. 22). On writs of error, review was had by the Circuit Court of Appeals, Eighth Circuit, and that Court, on July 2, 1928, affirmed both judgments. (R. 473.)

Specification of Assigned Error Intended to be Argued.

In compliance with the order of this Court the error intended to be argued is that misconduct of counsel for the plaintiffs in their arguments to the jury was so unfairly prejudicial to the defendant as to justify a new trial.

ARGUMENT.

The arguments to the jury by plaintiffs' counsel were so unfairly prejudicial to the defendant as to justify a new trial.

We might cite a great array of authorities to the effect that it is an abuse of the high prerogative of an attorney in his argument to the jury to appeal to prejudice irrelevant to the case or to introduce arguments that are not supported by the evidence and that such action constitutes error entitling the opposite party to a reversal. We assume, however, that the correctness of the general rule is not here involved, and shall therefore concern ourselves with the question whether the arguments of counsel for the plaintiffs in the cases at bar were so unfairly prejudicial to the defendant as to entitle it to a new trial. The Circuit Court of Appeals said the following in regard to this matter:

> "Both counsel for the plaintiff who addressed the jury stated that the defense charged that:
>
> 'The vilest defense made in this case, a defense which would bar that girl from all society, intimated in this case that she had the syphilis. That is the defense in this case, that she had the syphilis.'
>
> And then proceeded to dilate on and exploit this text. We find no justification for this assumption, or for the verbal pyrotechnics that counsel were permitted to indulge in over the objections of the attorneys for the defendant. The defense put no witnesses on the stand to controvert the plaintiff's evidence that the plaintiff did not have syphilis. The only evidence counsel for the plaintiff cites as justifying their argument was the cross examination of some of plaintiff's witnesses; but an affirmative defense of this character cannot ordinarily be proved by cross examination. Moreover, defendant's interrogatories along this line were no more than a continuation of similar questions propounded on the direct

examination. We therefore deem it proper to observe that this line of argument was likely to create prejudice, and did not aid the court or jury in the performance of their duties."

We begin then with these propositions established: (*a*) that there was no justification for the assumption that the defense in this case, was that Myrtle Johnson had the syphilis; (*b*) that there was no justification for the "verbal pyrotechnics that counsel was permitted to indulge in"; (*c*) that these were made over the objection of the defendant; and (*d*) that this line of argument was likely to create prejudice and did not aid the *Court* or *jury* in the performance of their duties.* In order to come to a proper determination of the question whether the arguments justified a new trial, a few of the circumstances of these cases should be considered. First of all, it is important to bear in mind that both lower courts applied the doctrine, *res ipsa loquitur*—liability was predicated solely on a presumption of negligence and this presumption was based on conflicting circumstantial evidence. This Court did not allow certiorari on this point and we do not propose to again argue it but we merely desire to emphasize the fact that since the jury was permitted to infer negligence from the circumstances of the occurrence when there was no direct evidence of negligence and when six members of the train crew testified that as far as they knew there was no unusual jerk or jar (R. 384, 377-378, 367, 370, 380, 386), that these cases required especial care from Court and counsel in order that the jury might be able to decide the issues submitted to them impartially as between party and party and that a fair trial might result.

Another element which should be considered is that in cases of this character there is a natural prejudice against

*In respondent's brief, in opposition to the issuance of writs of certiorari issue was taken with some of these propositions. Out of an abundance of caution, we have argued them in the Appendix hereto.

corporations. In *Eilers* v. *Peoria Railway Company*, 200 Ill. App. 487, 494, the following is quoted from *Illinois Cent. R. Co.* v. *Seitz*, 111 Ill. App. 242:

> "There is enough natural and inherent prejudice in the minds of jurors against railroad and other corporations without having it augmented by direct and improper appeals calculated to arouse the sympathy, passion or prejudice of jurors. A lawyer who tries his case in a proper manner, observing the ethics of the profession, is at a great temporary disadvantage when trying a cause against counsel who resort to improper language to obtain a verdict. Verdicts thus obtained generally are and always should be short-lived. Trial courts should set them aside as often as they are obtained. It is the policy of this court to discourage such misconduct on the part of lawyers by reversing judgments obtained by them when it is manifest they are the result of unprofessional conduct." (Cited with approval in *Paulsen* v. *McAvoy Brewing Co.*, 220 Ill. App. 273, 290.)

This natural prejudice was not diminished by such statements as these in the argument to the jury:

> " • • • this whole defense is a *claim agent defense*, prepared by the claim department of the New York Central Railroad" (R. 411-412).
>
> "I resent the New York Central *coming into this town*, etc." (R. 413.)
>
> "I cannot but feel a sense of sympathy for my good friend, Mr. Marley. I say that in all sincerity and kindness, because I know him and I know the obstacles that confront him as local counsel for *an eastern railroad*, the defense in a case of which is prepared by a claim department and handed on to him to try. It is especially hard for him because he knows those two young women, and, as he said, has known them for years, and knows they are good people. It is unfortunate that in his representation of this railroad he *is required to follow the dictates of some claim department*." (An objection to this statement was overruled. R. 424.)
>
> "Now, what do you understand from these witnesses *sent on here from New York* • • • "(R. 425.)
>
> "He (Mr. Marley) read the files in this case *sent on from New York*." (R. 425.)

"They knew immediately the Pullman reservations, as you know from common sense, showing the names of the persons occupying the berths in that train. They knew of this case right away. Common sense tells you, from your experience of life, that all they had to do was to look there and get the names of the other people on that train. Did they get them? Did they bring them all here? No. Why? The reason is obvious." (R. 425.)

"You mean to tell me that he didn't interpose an objection to a witness here when I asked him about somebody who went to see Geraughty or went to see Dr. Sanders from the New York Central?" (Rec. 426.)*

There is also a very natural sympathy for the injured person in actions of this nature. In *Dernberger* v. *B. & O. R. Co.*, 234 Fed. 405, affirmed 243 Fed. 21, the Court said:

"In the practical enforcement of the law in negligence cases, certain psychological conditions exist that do not exist in the trial of other cases, or, at least, exist in a much more accentuated and acute degree. Some one has been injured, has endured pain, has in case of death been deprived of the association, support, and affection of a near relative. Human nature at once calls forth regret and sympathy from court, counsel, jury, and all those who may hear the fact of there having been such accident. In most cases three distinct classes are involved: First, the plaintiff, who has suffered; second, the impersonal corporation; and, third, the latter's employe or employes by whose alleged negligence the injury resulted. If a corporation, as is usually the case, the defendant in the mind of average jurors is conceived

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*In the arguments to the jury, there appears to be a subtle appeal to sectional or local prejudices. Such appeal is, of course, improper. There is a charge that the trial attorney was required to follow the dictates of the defendant's claim department and that this was a "claim agent defense." There was no evidence to support this charge. It was improper and prejudicial. *Galveston Electric Co.* v. *Dobbert*, (Tex.) 127 S. W. 538; Cf. *Henry* v. *Illinois Cent. R. Co.* (Mo. Sup.) 3 S. W. (2d) 1004. There was no evidence that the defendant had the names of the other passengers. Such argument has been held prejudicial error. *Kansas C. Ft. S. & M. R. Co.* v. *Sokol*, 61 Ark. 130, 32 S. W. 497; *Stewart* v. *Met. St. Ry. Co.*, 72 App. Div. 459, 76 N. Y. S. 540; *Kernan* v. *Met. St. Ry. Co.*, 103 N. Y. S. 61; *Buckley* v. *Boston El. Ry. Co.*, 215 Mass. 50, 102 N. E. 75. Commenting on the rejected testimony was improper. *Weaver* v. *Winchell*, 116 Kans. 296, 226 Pac. 719; *Hinchman* v. *Pere Marquette R. Co.*, 136 Mich. 341, 99 N. W. 277; *Baldwin* v. *Grand T. R. Co.*, 64 N. H. 596, 15 Atl. 411.

to be endowed with large wealth and with unusual potentialities to defend and litigate, while the plaintiff is a personality, poor and helpless, and deprived to a degree at least, of his original means of caring for himself.

In the trial of the case, it takes a degree of self-restraint, hard to obtain in jurors, and more or less in judges, too, necessary to prevent them from unconsciously determining to help and decide for the injured plaintiff, if any excuse can be found for so doing."

All of these considerations require that the trial of such cases be as free from argument that might create passion or prejudice as is possible. But there were other circumstances which required temperate argument. Twenty-one witnesses testified for the plaintiffs as to the physical condition of Myrtle Johnson. Indeed the trial Judge, in his charge to the jury, in commenting on this matter, said:

"While the testimony has taken two days and the attorneys in the case have tried the case expeditiously on their part, it has revolved about two subjects only, as I view it; one the cause of the plaintiff's injury, the other the extent and nature of her injury. The testimony concerning the cause of the plaintiff's injury, if it had all been presented at one time, would not have taken more than five minutes, because most of the testimony in the case was concerning the nature of the injury." (R. 437.)

Myrtle Johnson showed the jury how the injury had affected her ability to walk (R. 251) and, according to the argument of her counsel (R. 429) "burst into tears and sobbed" when she was on the witness stand. This undue emphasis of her injuries was enhanced by counsel's arguments to the jury. We find such statements as these, in the argument to the jury for the plaintiffs:

"It resulted in the tragedy which has wrecked that girl's life, a tragedy which has caused her to be a hopeless cripple for the rest of her life and plunged her into an abyss of darkness." (R. 411.)

"We are suing this company for $25,000. for this girl, who will be a cripple the rest of her life, who will forever drag that foot, who will never be able to dance, who will never be able to sing, who will never be able to play the piano, who will never be able to be a wife to her husband; never in this world gentlemen * * * You can see how she walks. She will be a misery to herself; every time she attempts to take a step and is unable to do so, she suffers mental anguish; every time she sees people watching her, and knowing what she is doing, she suffers mental anguish." (R. 415.)

"I know that you will return a verdict for this plaintiff which will speak the truth and which will compensate her, as far as money can compensate her, for the injuries which she has received; and I will say this, that no money, no amount of money, will ever bring back to her the youth and beauty which she had in the first flush of glorious womanhood, that she had when she went there to New York and returned a hopeless cripple, to be a hopeless cripple the rest of her life."* (R. 416.)

"Oh, I wish I had an hour to talk to you.

'Life isn't life without hope;
It is but a lingering torment,
An image of death.'

'The memory of joy is not joy;
Sorrow's memory is sorry still.'"

"Think of it. Every day of that woman's life, from the time she arises in the morning, the constant realization, 'I am no longer myself; I am but a wreck of my former self; I can't cook, cut my food without assistance and help; I can't do the things that life was given me for to do; I am this invalid; I am this nervous wreck; I cannot enjoy life.' 'Here I am a young woman 30-odd years of age; I can't walk, I can't engage in games, I can't do anything that makes life worth living. What for? Why has this been brought upon me? What is all the reason for it?'" (R. 428.)

"And I ask you, as men good and true, who understand what life means, who understand what health means, above all other attributes of human beings, to

*Cf. *Higgins* v. *Stang*, (Wis.) 218 N. W. 832; *Stone* v. *Sinclair R. Co.*, 218 Mich. 53, 209 N. W. 118.

give to this woman every single penny that is asked. We ought to have asked for $50,000 instead of 25. I believe that it is a gross injustice for any juror to say, 'Oh, well, it wasn't somebody killed or a leg cut off.' I would rather have both of them cut off than to be suffering all my life with the tortures and the damnable affliction of life as she is, and the consciousness ever present, morning, noon and night, of this inability to do the ordinary things of life.

Is it any wonder that when that young woman took this stand in the very beginning of this trial and her mind was again brought to remember it that she burst into tears and sobbed?* Is it any wonder that that is true?'' (R. 428, 429.)

These arguments, except as otherwise indicated, were made without objection, no assignments of error were made on the basis thereof and the question as to their propriety has not been brought to this Court by the defendant. We submit, however, that it is a proper matter to be considered in determining the prejudicial effect of the arguments to which objection was taken and it is given here for that purpose. As shown above, Courts have condemned appeals of this kind.

With this background of a case in which negligence and liability is predicated solely on conflicting circumstantial evidence; where the natural prejudice against railroad corporations was enhanced by the argument to the jury; where there was an inherent sympathy for the injured person; where twenty-one witnesses testified in regard to the nature of the injuries which plaintiff had sustained; where the plaintiff burst into tears and sobbed while on the witness stand; where her injuries and their possible effect were set before the jury by counsel in their argument with all the pathos and forensic skill at the command of eloquent advocates; we come to the consideration of the arguments to which objection was made.

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*Cf. *Gold Mines Co.* v. *Bird*, (Ariz.), 260 Pac. 191; *Stutz* v. *Milligan*, (Mo. App.), 223 S. W. 128.

The opening argument for the plaintiffs contained the following:

> "But, gentlemen, the vilest defense made in this case, a defense which would bar that girl from all society, intimated in this case that she had the syphilis. That is the defense in this case, that she had the syphilis." (R. 412.)
>
> "Gentlemen of the jury, they would charge her with a disease which would brand her as bad as a leper and exclude her from the society of decent people. That is the kind of defense that is in this case, and I resent it. I resent the New York Central coming into this town and saying that that girl has the syphilis and trying to make this jury believe she has the syphilis." (R. 413.)
>
> "You can see how she walks. She will be a misery to herself; every time she takes a step and is unable to do so, she suffers mental anguish; every time she sees people watching her, and knowing what she is doing, she suffers mental anguish. And gentlemen, it is sought to say that that is the result of syphilis. Syphilis, one of the most—worst disease that is known in human history, a disease that can never be freed from the body; a disease that is worse than leprosy. That is the defense in this case. And, gentlemen, with not one, not one, scintilla of evidence in this case to justify it." (R. 415.)

This argument was followed by a temperate argument for the defendant in which counsel denied that he had charged that this woman suffered from syphilis. He said:

> "Now, gentlemen of the jury, you never heard me say a word about any specific trouble whatever. I said nervous exhaustion, didn't I? Now I want to say to you now that I don't think she ever had a specific trouble at all, and I never have said that she did have." (R. 420.)

He thereupon discussed the evidence of plaintiff's witnesses showing that one doctor had a Wasserman test made and gave her iodide of potassium and that that evidence suggested to him that the doctor had made "a wrong diag-

nosis of the case and had been giving this poor woman the wrong treatment." (R. 420.) He discussed the testimony of another doctor whose testimony showed that he had given her salvarsan and said: "In other words, gentlemen, he too had made a wrong diagnosis." (R. 421.) He continued: "What did it prove, gentlemen? That she had had any specific trouble? She would have responded to that treatment. But no, she didn't have it" (R. 421) and discussed the possible effect of the treatment on one who did not have the disease.

It almost appears from the record that counsel for the plaintiffs detected that this open and straightforward denial of the charge had some effect on the jury for in their closing argument, after having complimented the Court and jury, counsel apparently desired to overcome defendant's counsel's denial of the charge by exculpating him personally and placing the entire charge on this "eastern railroad." He said:

> "I cannot but feel a sense of sympathy for my good friend, Mr. Marley. I say that in all sincerity and kindness, because I know him and I know the obstacles that confront him as local counsel for an eastern railroad, the defense in a case of which is prepared by a claim department and handed on to him to try. It is especially hard for him because he knows those two young women and, as he said, has known them for years, and knows they are good people. It is unfortunate that in his representation of this railroad he is required to follow the dictates of some claim department." (R. 424.)

Thereafter follow these statements:

> "Now I want to get some more things to you. You note that Mr. Chilcott said in his opening statement: 'I only know from rumor what the defense in this case may be, but we will be able to meet it'; and just the moment that counsel for the defendant began to interrogate these witnesses with reference to the condition of the blood I made up my mind I would meet it right there. They never for one minute had an idea that we

would put Dr. Geraughty on the stand, so that they couldn't come before this jury and say, 'Why didn't you bring that man?' You mean to tell me when a man who knows all about arachnoids and pia mater and dura mater and all about those things, that he hadn't prepared this defense and worked it out from start to finish? You mean to tell me he didn't talk to those doctors about it? You mean to tell me that he didn't interpose an objection to a witness here when I asked him about somebody who went to see Geraughty or went to see Dr. Sanders from the New York Central? That he wasn't aware of that, and he wasn't trying to put the stigma of indecency upon this young woman in his defense? You mean to say that he wasn't aware of that situation?

Oh, I have been too long in this business of trying law suits not to know that. So I immediately came to the front and exposed him, and proved it to the hilt; so much so that they stopped. Then they started with the colored man. Never again will you ever dare to put that letter of syphilis upon the brow of a decent woman—" (R. 426.)

To make the arguments which plaintiffs' counsel made to the jury in these cases and especially when made without any evidence to support them can hardly be said to contribute to a dispassionate view of the evidence by the jury but on the contrary the language used was calculated and presumably intended to dethrone the reason and equilibrium of the jury and to disturb that calm deliberation which it is the duty of the jury to bestow. The statements are in themselves prejudicial and their effect was, no doubt, increased by having them spoken in a spirit of indignation and vindictiveness under the inciting circumstances surrounding an important trial. As the Supreme Court of Texas said in a case which was reversed because plaintiff's counsel in his argument to the jury stated that a physical examination of the wife of plaintiff procured on an order of court was an outrage, etc.: "The fact that this oratorical display of counsel approaches the eloquent simply increases the probability

of undue influence upon the jury, and consequent injury to the defendant." (*Gulf, C. & S. F. Ry. Co.* v. *Butcher*, 18 S. W. 583, 584.)

It is significant that neither in this court, in their brief in opposition to the granting of writs of certiorari nor in their brief in the Circuit Court of Appeals, did counsel contend that the argument in question was not of a character calculated to arouse passion and prejudice. The natural effect of the argument would be to lead the jury to disregard liability for the injuries which were sued for and instead of bringing in compensatory damages for such injuries, if they found the defendant liable, these statements would lead them to disregard liability and compensatory damages entirely and to bring in punitive damages against the defendant for having been guilty of the conduct with which it was so unjustly charged. As authority for this statement we need go no further than the brief filed by counsel for plaintiffs in this court. They say:

> "Let us assume as a fact that plaintiff did not have syphilis at all, and that defendant had no evidence whatever to prove that she did have syphilis; then the attempt of defendant's counsel to prove she had syphilis was contemptible; it was a terrible thing to do; it was an attempt to put a stigma upon a pure and innocent woman; an attempt that any lawyer was in duty bound as an advocate and as a man to sternly denounce. * * * A woman is not considered 'decent' who is known to have the dreadful disease. Any railroad company defending an honest claim against it for damages that openly or covertly charges or insinuates that a pure and innocent woman has such a loathesome, dreadful, contagious, venereal disease, deserves the condemnation of every man that honors womanhood, and a lawyer who represents such a good woman thus basely maligned who would not on her behalf expose and condemn such assailant is unworthy to practice law." (Respondent's brief in opposition to issuance of writs of certiorari, page 42.)

If the jury in this case considered the defendant guilty of such conduct—and in view of the rulings of the Court and

their natural unfamiliarity with the legal intricacies of a trial, the jury would have every reason to believe the charge true —they, according to counsel, would be in duty bound as men "to sternly denounce" such conduct. It would deserve their "condemnation" and, as a lawyer who would fail to denounce it would be "unworthy to practice law," so it follows that jurors who failed to denounce it would not have properly performed their duty. The jury had only one way of denouncing this conduct and that was to find the defendant guilty and assess as heavy damages as possible. This they did, bringing in verdicts for the full amount sued for in each case. But verdicts thus obtained are not the result of a fair and impartial trial.

In *Monroe* v. *Chicago & A. R. Co.*, 297 Mo. 633, 249 S. W. 644, the Supreme Court of Missouri quoted the following with approval from *Beck* v. *Railroad*, 129 Mo. App. 7, 24, 108 S. W. 132, 138:

> "Trials before juries ought to be conducted with dignity and in such manner as to bring about a verdict based solely on the law and the facts. Hence reckless assertions unwarranted by the proof and intended to arouse hatred or prejudice against a litigant or the witnesses are condemned as tending to cause a miscarriage of justice."

In *Union Pacific R. Co.* v. *Field*, 137 Fed. 14, 15, Judge Sanborn said:

> "A trial is not fair and impartial in which a discussion of irrelevant issues, a statement of persuasive but immaterial fact, or the assertion or insinuation of an erroneous view of the law or of the wrong measure of damages by counsel in his address to the jury, may have had an influence favorable to his client."

In *Waldron* v. *Waldron*, 156 U. S. 361, 380, 383, this Court, in reversing a judgment because of improper argument, said:

> "Indeed, the fact is that the counsel after referring the jury to the evidence which was not in the record stated

to them, in effect, that it established the fact, or authorized the fair inference that the decree of divorce had been rendered on the ground of adultery with Mrs. Alexander, and therefore conclusively established the right of the plaintiff to recover in the present case. It is unnecessary to say that all this is ground for reversal, unless its legal effect be in some way overcome. It is elementary that the admission of illegal evidence, over objection, necessitates reversal, and *it is equally well established that the assertion by counsel, in argument, of facts, no evidence whereof is properly before the jury, in such a way as to seriously prejudice the opposing party, is,* when duly excepted to, *also ground therefor.* (Citing authorities) * * *

Undoubtedly it is not only the right but the duty of a court to correct an error arising from the erroneous admission of evidence when the error is discovered, and when such correction is made, it is equally clear that, as a general rule, the cause of reversal is thereby removed. (Citing authorities) There is an exception, however, to this general rule, by virtue of which the curative effect of the correction, in any particular instance, depends upon whether or not, considering the whole case and its particular circumstances, the error committed appears to have been of so serious a nature that it must have affected the minds of the jury despite the correction by the court." (Italics ours.)

This case suggests a discussion of the effect of the rulings and instructions of the trial Judge on the argument in question. When the first objection was made the Court said:

> "The objection is overruled, in view of the examination of witnesses and of the testimony in the case." (R. 412.)

Counsel for plaintiffs having thus secured permission of the Court for this line of argument proceeded as above quoted. After another objection was made it was agreed by the Court and defendant's counsel that the objection would continue to this line of argument (R. 413), but when this subject was again argued by counsel making the closing argument for

plaintiffs, this ruling was made after objection by the defendant:

> "The gentlemen of the jury will recall what the testimony has been. Counsel may argue the testimony as they recall it and draw inferences from the testimony which they think may be drawn." (R. 427.)

Instead of guarding "the jury with zealous care against all illegal, improper or unfair arguments or suggestions" (*Union Pacific R. Co.* v. *Field*, 137 Fed. 14) as is of "gravest importance," the argument in question was permitted to go to the jury with the Court's sanction, its effect being thereby greatly enhanced. A few brief quotations from the cases will demonstrate this.

In *Hall* v. *United States*, 150 U. S. 76, 81, Mr. Justice Gray, said:

> "The presiding judge, by declining to interpose, notwithstanding the defendant's protest against this course of argument, *gave the jury to understand that they might properly and lawfully be influenced by it;* and thereby committed a grave error, manifestly tending to prejudice the defendant with the jury, and which, therefore, was a proper subject of exception, and, having been duly excepted to, entitles him to a new trial. *Wilson* v. *United States*, 149 U. S. 60, 67, 68." (Italics ours.)

In *Kirkpatrick* v. *Wells*, 6 S. W. (2d) 591, the Supreme Court of Missouri, in reversing a judgment, said:

> "The court, by overruling the objection, approved the argument. It was made with the sanction of the court and was prejudicial."

In *London* v. *Bay State St. Ry. Co.*, 231 Mass. 480, 121 N. E. 394, 395, the Court said the following:

> "The argument as a whole called for rigorous and emphatic action on the part of the judge. The burden was upon him to make certain that the jury would disregard this appeal to them to violate their duty. The action taken by the presiding judge fell short of this. What the judge said was:

'It is sufficient to say, perhaps, as to both of those that neither statement has any bearing on any issue that you are trying.'

That is not an instruction that the jury should disregard this argument. Nor is it an instruction equally favorable to the defendant."

In *Illinois Power & Light Corp.* v. *Lyon*, 311 Ill. 123, 142 N. E. 456, the Court said:

"When objections were made to such unfair and improper arguments, the court had a duty to perform, and the mere perfunctory statement on each occasion that counsel should confine himself to the evidence was not a ruling on the objection made or in response to it. It was not a discharge of the duty of the court as a factor in the administration of justice and nothing more than friendly advice to the attorney to be good. The attorneys were not talking about the evidence, but were attempting to create prejudice, and a judgment founded on a verdict tainted with such an argument cannot be permitted to stand."

It is clear that counsel's argument went to the jury with the sanction of the trial Court. That such sanction enhanced the prejudicial effect of the argument is equally clear. Thus in *People* v. *Fielding*, 158 N. Y. 542, 53 N. E. 497, the Court said:

"The language of the prosecuting officer, thus indorsed by the highest authority known to the jury, must have gone home to their minds with powerful and convincing effect, while the counsel for the defendant was left in the attitude of a wrongdoer trying to disturb the proceedings of the court."

And in *Haake* v. *G. H. Dulle Milling Co.*, 168 Mo. App. 177, 153 S. W. 74, 75, the Court said:

"The only purpose the speaker had, or could have had, in making such an argument was to arouse the sympathy and inflame the passions of the jury and coin those emotions into dollars. The rulings of the court, on the whole, merely afforded an opportunity to the

> speaker to emphasize and aggravate the error. He came out with flying colors before the jury when he should have been most sternly reprimanded. Due allowance must be made for fervor in advocacy; but it is the duty of the court to keep impassioned oratory within the limits of the record, and not to allow a party to be injured in his rights by his adversary's extrinsic and passionate eloquence."

Other than the statements that the jury were the sole judges of the facts (R. 429) and that they must depend entirely upon their own recollection of what the testimony was and not upon the recollection of any other person, Court or counsel (R. 437), there was nothing in the charge to the jury which would tend to offset the prejudicial arguments of plaintiff's counsel. These statements, of course, could not offset the prejudice induced by counsel's argument. It is fair to assume that the forceful and repeated statements of counsel, sanctioned as they were by the Court, had more influence upon the minds of the jury than their recollection of what the evidence really was.

In *Cherry Creek National Bank* v. *Fidelity Insurance Co.*, 207 App. Div. 787, 202 N. Y. S. 611, which was a suit on a burglary policy a judgment for the plaintiff was reversed because of prejudicial argument, although the Court held that the verdict was not contrary to the evidence. Counsel for plaintiff argued to the jury that another insurance company had paid the amount due from it and also said the following:

> "They started out very bravely, with shoulders back, heads in the air, and they were going to show you about those vault doors; and what they had in mind was that they were going to try and establish that the vault doors were not locked, but were burned when they were opened, and they originally meant that some of these girls, Miss Lake or Smith or some one else robbed that bank—"
>
> "I hope and believe that this jury is going to place the stamp of its condemnation on the kind of practices

which have obtained in this case. I think you are going to put the stamp of your condemnation upon the defense of lawsuits of this character by outside people whose business it is not. What are we going to think when we get denied a little insurance which is due us? Have we got to fight to get it? Have we got to fight the bank accounts of all these mighty corporations?"

The Court there said:

"These quoted passages do not embody all of the occurrences of this kind upon the trial, but they are fair samples of the others, and illustrate sufficiently the conduct of counsel. In our opinion the learned trial court chose apt and vigorous words to characterize the conduct. His admonitions to counsel were sound, and should have been regarded. His instructions to the jury were well and properly given. He did everything to protect the interests of the litigants, short of declaring a mistrial. He expressed his impression that he should also have done that. We agree with him that, in view of the serious character of the repeated breaches of the rules, the defendant's motion that a mistrial be declared ought to have been granted. *Zukas* v. *Lehigh Valley Coal Co.*, 187 App. Div. 315, 319, 175 N. Y. Supp. 408.

The rule allowing counsel when addressing the jury the widest latitude in discussing the evidence and presenting the client's theories falls far short of authorizing the statement by counsel of matter not in evidence, or indulging in argument founded on no proof, or demanding verdicts for purposes other than the just settlement of the matters at issue between the litigants, or appealing to prejudice or passion. The rule confining counsel to legitimate argument is not based on etiquette, but on justice. Its violation is not merely an overstepping of the bounds of propriety, but a violation of a party's rights. The jurors must determine the issues upon the evidence. Counsel's address should help them to do this, not tend to lead them astray. *Cattano* v. *Metropolitan St. Ry. Co.*, 173 N. Y. 565, 66 N. E. 563. The law is so insistent that misleading prejudicial matter shall not be allowed to enter jurors' minds that under certain circumstances the asking of an incompetent question for an ulterior purpose, even though the question be not answered, will justify the setting aside of a verdict. *Cos-*

selmon v. *Dunfee*, 172 N. Y. 507, 65 N. E. 494. Breaches of the rule limiting counsel to a discussion of the evidence have become all too frequent of late. It is time that the bar should realize that, when counsel in a close case resort to such practices to win a verdict, they imperil the very verdict which they thus seek. *Graham* v. *Graham*, 142 App. Div. 131, 126 N. Y. Supp. 941; *National Supply Co.* v. *Jebb*, 142 App. Div. 256, 127 N. Y. Supp. 52; *Harris* v. *Eakins*, 201 App. Div. 257, 194 N. Y. Supp. 187; *Loughlin* v. *Brassil*, 187 N. Y. 128, 79 N. E. 854; *Simpson* v. *Foundation Co.*, 201 N. Y. 479, 95 N. E. 10, Ann. Cas. 1912B, 321; *Dimon* v. *New York Cent. & H. R. R. Co.*, 173 N. Y. 356, 66 N. E. 1; *Cox* v. *Continental Insurance Co.*, 119 App. Div. 682, 104 N. Y. Supp. 421; *Williams* v *Brooklyn El. R. Co.*, 126 N. Y. 96, 26 N. E. 1048."

In *Gibbons* v. *Pennsylvania R. Co.*, 291 Pa. 141, 139 Atl. 743, the Court said:

"It is admitted that counsel for plaintiff stated in argument as follows:

'Just look at that man. Does he look like a crook? Does he look like a liar, and does he look like he was a man who was trying to rob some railroad?'

This comment was manifestly improper. The question for the jury to determine was not whether Gibbons was a crook, a perjurer, or a robber, but whether the facts as testified to showed negligence on part of the railroad, free from proof of contributory negligence of plaintiff. *The natural tendency* of such language *was to put in the minds of the jurors the impression that, if they did not decide in favor of the claimant, their determination would in effect be a declaration that he was of the criminal class suggested.*

The evident purpose was to prejudice the triers of fact, and it deserved the immediate condemnation of the trial judge. (Citing and quoting from authorities) * * *

What was said in *Mittleman* v. *Bartikowsky*, *supra*, 283 Pa. 485, page 488 (129 A. 566), may now be appropriately repeated:

'It should, furthermore, be kept in mind that once having made improper remarks, it will not always avail

the offending counsel to say that he was justified because of the "atmosphere of the trial" or because of the manner in which his opponent conducted his case.'

The effect of the argument complained of was to give a wrong impression to the jury of the question to be decided, or at least this may have been the result. As counsel made no attempt to withdraw his improper statement, when objection was made, and the trial judge failed to caution the jury at the time, or later in its charge, against permitting the same to have any influence or in any way prejudice it in reaching a verdict, the case should be retried. The failure to thus admonish the jury, when attention was specifically drawn to the matter, might well have been considered an approval of the argument submitted." (Italics ours.)

We conclude with the following from *People* v. *Fielding*, 158 N. Y. 542, 53 N. E. 497, which, although said in a criminal case, is applicable here:

"Whether the defendant be innocent or guilty, in our opinion he has not been adjudged guilty in accordance with law, because he has not had the fair and impartial trial which the law prescribes for a person charged with crime. If we disregard a sound and well-established rule in his case because we think he is guilty, we tear down one of the safeguards provided by society for the protection of its citizens, and the precedent may at some time aid in depriving an innocent man of his liberty or his life. The judgment should be reversed, and a new trial ordered."

Respectfully submitted,

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